MARY JO WHITE
United States Attorney for the
Southern District of New York
By: JANE A. LEVINE (JAL-3332)
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
Tel. (212) 637-1063

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | |
| Plaintiff, | : | 96 Civ. 2527 (AKH) |
| v. | : | |
| A $20 GOLD COIN, KNOWN AS A 1933 "DOUBLE EAGLE" MINTED AT THE UNITED STATES MINT IN PHILADELPHIA, PENNSYLVANIA, | : | |
| Defendant-in-rem, | : | |

**Preliminary Statement**

The United States brought this civil action to recover a $20 gold piece bearing the date 1933, called a Double Eagle, that was stolen from the United States Mint nearly 65 years ago. The theft was discovered in 1944, when the United States Secret Service commenced an extensive investigation that ultimately determined that the Mint Cashier acting in concert with two gold dealers had stolen an unknown quantity of 1933 Double Eagles from a Mint safe and marketed them to collectors and dealers. The 1933 Double Eagles are readily identifiable as stolen property

because in 1933 President Roosevelt took the country off the gold standard, and not a single 1933 Double Eagle was ever issued to the public as money or currency and no such coin ever left the Mint in a lawful manner. Since 1944, the United States Secret Service has succeeded in recovering nine other of the stolen 1933 Double Eagles. The defendant-in-rem piece is the tenth.

British coin dealer, Stephen Fenton, bought the defendant-in-rem 1933 Double Eagle for $210,000 and arranged to sell it to a United States buyer for $1.5 million, and proceeded to import it into the United States from Great Britain to consummate the sale. Fenton and his representative, Jasper Parrino, knew that the 1933 Double Eagle was stolen property belonging to the United States and subject to seizure in this country. What they did not realize was that the United States buyer for the defendant-in-rem 1933 Double Eagle was a confidential informant working with the Secret Service. The 1933 Double Eagle was seized in New York, New York in February 1996 by the Secret Service. Criminal charges were brought by the United States Attorney's Office against Fenton and Parrino but have been dismissed without prejudice. In this action the Government seeks forfeiture of the 1933 Double Eagle under two forfeiture claims. The Government's third claim is a non-forfeiture based action to clear title.

Fenton moves for partial summary judgment on the

Government's two forfeiture claims. His motion does not address the Government's claim of superior title. Fenton argues first that the defendant-in-rem 1933 Double Eagle is the specific 1933 Double Eagle that ex-King Farouk of Egypt once possessed, and that this particular 1933 Double Eagle "lost" its status as stolen property for purposes of the National Stolen Property Act, 18 U.S.C. § 2314, because the Government briefly possessed it in late February 1944 when issuing an export license to the Royal Legation of Egypt to export the piece to Egypt. Fenton's contention is without merit and should be rejected.

As a threshold matter, Fenton has failed to advance undisputed proof that the defendant-in-rem 1933 Double Eagle is the King Farouk specimen. Fenton's main evidence tracing the lineage of the defendant-in-rem 1933 Double Eagle to King Farouk is the multi-layered, inadmissible hearsay testimony of his business partner. There are substantial genuine questions of fact relating to this point, and the identity of the defendant-in-rem 1933 Double Eagle as having been possessed by a specific individual is not appropriate for resolution on summary judgment.

Moreover, even assuming arguendo that the defendant-in-rem 1933 Double Eagle is the King Farouk specimen, Fenton's theory that it "lost" its status as stolen property is nonetheless flawed legally and factually. Fenton relies on a common law rule that when stolen goods are recovered by the

police they are no longer stolen and thus a subsequent recipient of those goods cannot be prosecuted for receiving stolen property. This doctrine has no rational application to the facts of this case. The King Farouk 1933 Double Eagle was not recovered by police in the instant case; the piece came into the possession of the Government and the export license was issued before discovery of the theft of 1933 Double Eagles from the United States Mint's safe. The common law pertaining to receipt of stolen property is inapplicable to the Treasury Department's possession of the King Farouk coin in connection with the export license prior to discovery of the theft. There is no case in any jurisdiction supporting the notion that stolen property loses its character as stolen by virtue of an unknowing temporary possession.

Fenton also contends that the Government "authorized" private possession of the defendant-in-rem 1933 Double Eagle with issuance of a 1954 Treasury Order and passage of the Coinage Act of 1965. These contentions are erroneous. Neither the 1954 Treasury Order nor the Coinage Act of 1965 can be read to authorize possession of stolen property. The 1954 Treasury Order expressly covers only coins "known to have been in circulation." The phrase "in circulation" does not mean "stolen." Likewise, Section 102 of the 1965 Coinage Act, cited by Fenton in support of his motion, merely provides that coins and federal reserve

notes (paper money), "whenever coined or issued" are legal tender for the kinds of debts specified. This statute does not, as Fenton argues, make a stolen 1933 Double Eagle legal tender. Furthermore, the legislative history to the Coinage Act of 1965 makes it clear that Congress did not intend to change existing law. Thus Fenton's interpretation of this language as having changed the status of the stolen 1933 Double Eagles is plainly in error. Furthermore, Section 102 is no longer governing law. The monetary statutes were recodified in 1983 and the phrase "whenever coined or issued" was stricken as superfluous and unnecessary. Fenton's interpretation that the 1965 law transformed stolen 1933 Double Eagles -- pieces never lawfully released as money -- into legal tender authorized for private ownership is erroneous.

Finally, Fenton seeks summary judgment on the Government's claim that the 1933 Double Eagle is subject to forfeiture because it was imported on the basis of a material false statement. Fenton claims that he did not prepare the Customs documents containing the false statements and that the statements, though false, are immaterial. Fenton's contention is without merit, as there is substantial probative evidence that while Fenton may not have personally prepared the Customs forms, he nonetheless procured the false statement because he knew that his Customs broker would use a standard form that he had used in

the past falsely describing the gold coins being imported as legal tender issued by the Mint dated 1803 to 1932. There is evidence that Fenton knew the United States regarded all 1933 Double Eagles as subject to seizure. After failed efforts to lure the prospective buyer out of the United States to consummate the sale of the 1933 Double Eagle, Fenton's representative, Jasper Parrino, was recorded on tape as stating that the coin would be imported by means of a falsely dated invoice. Thus, Fenton's knowledge that his Customs broker would in fact use a misdated invoice is a question of fact. Furthermore, there is no dispute that Fenton provided a false valuation of the 1933 Double Eagle, claiming that it had a value of $350,000, when he had agreed to sell it for $1.5 million.

Finally, whether the false statements regarding the identity and value of the defendant-in-rem 1933 Double Eagle are material is in dispute. The date 1933 is perhaps the most material identifying feature pertaining to a United States $20 Double Eagle. To falsely describe a $20 Double Eagle as having the date 1932 or earlier masks the critical fact that the piece being imported is not a legitimate collectors item, but rather is a notorious 1933 Double Eagle, stolen property sought by the United States for the past one-half century. It is difficult to imagine a more material fact concerning a $20 Double Eagle than the fact that it bears the date 1933. Fenton's undervaluation of

the 1933 Double Eagle is also material, as it hides the true identity of the piece being imported as extremely valuable.

Fenton's motion should be denied in all respects.

**THE GOVERNMENT'S CLAIMS**

The Government has asserted three separate claims in this lawsuit -- two are pursuant to the federal forfeiture laws and the third is a civil action to clear title. The two forfeiture claims are governed by a different standard and burden of proof than the superior title claim.

**A. The Forfeiture Claims**

The defendant-in-rem 1933 Double Eagle is subject to forfeiture because there is probable cause to believe that it was imported contrary to law in violation of 19 U.S.C. § 1595a(c). The defendant-in-rem 1933 Double Eagle is property stolen from the United States Mint, which was knowingly transported in foreign commerce in violation of the National Stolen Property Act, 18 U.S.C. § 2314, and was thus imported contrary to law (hereinafter "the Stolen Property Forfeiture Claim").

The Government also seeks forfeiture pursuant to 18 U.S.C. §§ 545 and 981(a)(1)(C) and 19 U.S.C. § 1595a(c) based on probable cause to believe that the defendant-in-rem 1933 Double Eagle was introduced into the United States by means of a fraudulent or false statement (hereinafter the "False Statement Claim"). Specifically, Fenton's authorized Custom's broker

represented on a United States Customs Form that Fenton was importing only "legal tender U.S. Gold Coins Minted by the United States Government between 1830 and 1932," with an aggregate value of $742,000, when Fenton was knowingly importing into the United States a Double Eagle $20 gold coin struck in 1933, never issued, stolen from the Mint and which belonged to the United States, and which Fenton had agreed to sell for $1,500,000.

**1. Forfeiture Procedure and Proof Requirements**

The above cited statutory forfeiture provisions incorporate the special procedures for forfeiture proceedings set forth in the Customs laws. Those laws establish that the Government's burden in proving a forfeiture claim is to show that there is probable cause to forfeit the property. 19 U.S.C. § 1602-1621. In a civil forfeiture proceeding, "the burden is initially on the government to establish its right to forfeiture by demonstrating probable cause." United States v. One Parcel of Property Located at 15 Black Ledge Drive, 897 F.2d 97, 101 (2d Cir. 1990). "To establish its case, the government must have reasonable grounds, rising above the level of mere suspicion, to believe that certain property is subject to forfeiture." United States v. One Parcel of Property Located at 15 Black Ledge Drive, 897 F.2d at 101. The Government may establish probable cause by direct and/or circumstantial evidence. Otherwise inadmissible, yet reliable, hearsay evidence may also be used by the Government

to demonstrate probable cause. United States v. United States Currency on Deposit in Account 1115000763247, 176 F.3d 941 (7th Cir. 1999).

Once the Government satisfies this probable cause showing the burden of proof shifts to the claimant. "19 U.S.C. § 1615 places on the claimant 'the ultimate burden of proving that the factual predicates for forfeiture have not been met.'" Black Ledge Road, at 101 (citation omitted); see also Marine Midland Bank, N.A. v. United States , 11 F.3d 1119 (2d Cir. 1993). The claimant's burden is to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture because the Government has not demonstrated probable cause.

A summary judgment motion on a forfeiture claim "must be determined in the context of the 'peculiar procedural requirements of the forfeiture laws.'" Black Ledge Road, 897 F.2d at 101 (citation omitted). In the forfeiture context, a claimant will prevail on summary judgment only where the claimant demonstrates that the Government has failed to set forth facts establishing probable cause and where there is no genuine issue of fact for trial.

**B. The Government's Superior Title Claim**

The Government has also asserted a non-forfeiture basis of recovery in this action, that is, that the defendant-in-rem 1933 Double Eagle is property that was stolen from the United

States and to which the United States has superior title over Fenton, even if, assuming arguendo, Fenton were a bona fide, good faith purchaser, a point the Government in no way concedes. This issue has been ruled on in a prior case involving another 1933 Double Eagle. In United States v. Barnard, 72 F. Supp. 531 (W.D. Tenn. 1947), the United States brought a civil replevin action to recover a 1933 Double Eagle from L.G. Barnard, a coin collector who had purchased a 1933 Double Eagle in 1944 without knowledge that the coin had been stolen from the United States Mint. The Government sued for title to the piece on the same legal theory raised in this lawsuit, that it was property stolen from the United States and thus the United States had superior title to the coin even over a subsequent purchaser without knowledge of the theft. In Barnard, the Government established that no 1933 $20 Double Eagle coins were ever issued as money or otherwise lawfully conveyed to any person and therefore any extant 1933 $20 Double Eagle constitutes Government property. Barnard claimed that he was a bona fide purchaser without knowledge or notice that the coin was stolen property, that the coin was currency, not chattel, and he was therefore entitled to have it returned to him. United States v. Barnard, 72 F. Supp. 531.

The Court in Barnard reviewed the minting of the 1933 $20 Double Eagles, the Executive Orders and legislation prohibiting the coinage and payment of gold coin in effect in at

the time, and the facts concerning the Mint's manufacture and melting of the gold coins into bullion. Barnard, 72 F. Supp. at 532. The Court concluded that "it is clear that the gold piece which is the basis of this law suit did not leave the Mint as regularly and lawfully issued money, or currency." Id. The Court went on to say that, "it is a fair inference, from the proof in this case, that the Double Eagle here involved was taken out of the Mint in an unlawful manner." Id. The Court concluded that:

> Since the gold piece was stolen or, through fraudulent breach of trust, taken from the Philadelphia Mint, the defendant, as the purchaser, took the same subject to the defects in its title and this is true, even though the property was acquired in good faith, for a valuable consideration and without notice of any infirmity of title. He cannot maintain ownership in such property against one who has been deprived of it by theft or other illegal act.

72 F. Supp. at 532-3. The Court awarded the coin to the United States.[1]

The Government's Superior Title Claim in this case is

---

[1] Fenton attempts to evade the precedent set by Barnard by unconvincingly arguing that the parties in Barnard stipulated to "virtually all of the issues," including the weights of the pieces minted and melted, which Fenton says he will dispute based on documents produced by the Government in this case. Br. at 33 n.16. First, the stipulation reached in Barnard consisted of one paragraph and did not cover "virtually all" the issues in the case. Levine Dec. Ex. A. Moreover, there is no genuine question regarding the weights of the gold coins minted and melted. Finally, weights evidence is but one small piece of the evidence demonstrating the theft of 1933 Double Eagles.

based on the same facts and legal theory as presented in Barnard, although, in this case the passage of time has enabled the Government to augment its proof with overwhelming evidence relating to the theft of 1933 $20 Double Eagles from the Mint.

The Government's Superior Title theory rests on the long established legal principle in this country that even a good faith purchaser cannot acquire clear, superior title from a thief. DeWeerth v. Baldinger, 658 F. Supp. 688, 696 (S.D.N.Y. 1987) ("under New York law not even a bona fide purchaser can acquire valid title of a chattel from a thief, or from one who acquired the property from a thief") reversed on other grounds, 836 F. 2d 103 (2d Cir. 1987); Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 833 (E.D.N.Y. 1981) ("It is a fundamental rule of law in New York that a thief or someone who acquires possession of stolen property after a theft 'cannot transfer a good title even to a bona fide purchaser for value (because) (o)nly the true owner's own conduct, or the operation of law ... can act to divest that true owner of title in his property ...'") (citing 3 Williston, Sales § 23-12), aff'd 678 F.2d 1150 (2d cir. 1982); Guggenheim v. Lubell, 77 N.Y.2d 311, 317 (Ct. App. N.Y. 1991) ("New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value"); Saltus & Saltus v. Everett, 20 Wend. 267,

1838 WL 3100 (N.Y. 1838) ("The universal and fundamental principle of our law of personal property, is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchase under a defective title cannot hold against the true proprietor."); see also Autocephalour Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278, 291 (7th Cir. 1990); (court held that the defendant "as an ultimate purchaser from a thief, has no valid claim of title or right to possession of the mosaics").

The same principle applies under the laws of Great Britain where Fenton acquired the coin. The United States common law principle that one cannot get clear title from a thief actually derives from English law, which can be summarized with the maxim *nemo dat quod non habet*, or "no one gives what he does not have." The Sale of Goods Act §21(1) in Great Britain provides that a buyer "acquires no better title to the goods than the seller had". Thus Fenton did not take good title to the piece in Great Britain.

Even assuming arguendo that the particular 1933 Double Eagle Fenton acquired was the one King Farouk had purchased in 1944, as Fenton contends, the United States would nonetheless have superior title. As discussed more fully below, King Farouk purchased the piece in the United States ultimately from a thief,

and therefore, he never held clear title. The United States demanded return of the coin, and when King Farouk's collection was auctioned off in 1954, the United States succeeded in getting Egypt to withdraw the 1933 Double Eagle from auction. While Egypt withdrew the piece from auction and was considering returning to the United States it was not returned. Fenton claims that the withdrawn piece was either given to or purchased by a high ranking Colonel in the Egyptian government with close ties to General Nasser; Fenton alleges that he acquired the defendant-in-rem 1933 Double Eagle from a jeweler who was acting as a representative of this Colonel's heirs. Br. at 19. Under Fenton's own theory, it can be inferred that the Colonel acquired the 1933 Double Eagle after its official withdrawal from the auction, with full knowledge that the United States had made a demand for its return as stolen property belonging to the United States. Thus, Fenton's rendition of the facts, if true, means that the conveyance in Egypt was with knowledge of the United States' claim. There was no bona fide, good faith acquisition in Egypt and thus the Colonel, if he exists, did not have clear title. Further, the Egyptian Civil Code, Article 466 provides, in substance, that one who purchases property from someone who does not have title, does not acquire ownership of the property. Thus, under the laws of any relevant jurisdiction, Fenton does not have title to the coin.

In any event, Fenton's motion for summary judgment expressly does not pertain to the Government's Superior Title Claim. Br. at 10 n.7. The only discussion in Fenton's papers of the Government's Superior Title Claim is contained in a "back of the hand" footnote which incorrectly declares that if Fenton "wins" on the two forfeiture claims "the Government has necessarily failed to demonstrate its declaratory judgment claim for title of the 1933 Double Eagle." Id. Fenton's analysis on this point is dead wrong. As discussed below, even if he prevails on this motion, the Government's Superior Title Claim would survive, as none of the unavailing arguments raised in Fenton's motion relating to a transformation of the defendant-in-rem 1933 Double Eagle from stolen into non-stolen would defeat the entirely separate legal issue of whether the Government has superior right, title, and interest to the defendant-in-rem 1933 Double Eagle over Fenton.

## STATEMENT OF FACTS

### A. Facts Establishing Theft From US Mint

While Fenton's motion assumes for purposes of argument that the defendant-in-rem 1933 Double Eagle was stolen from the Mint, he neglects to review any of the pertinent facts which establish the theft. Those facts are a critical part of this case and are therefore briefly reviewed below.

Prior to 1933, the United States coined and issued gold

coins bearing the Saint Gauden's Eagle design in various denominations, including $20. In early 1933, President Franklin Delano Roosevelt implemented a new monetary policy as one of the many measures designed to reverse the Great Depression. On March 6, 1933, President Roosevelt issued a Proclamation declaring a "Bank Holiday" closing banks and prohibiting payment of gold coin in order to prevent further hoarding of gold. (See Berke Dec. Ex. I for full text of Proclamation). Beginning with the Bank Holiday of March 6, 1933, numerous subsequent Executive Orders, Regulations of the Secretary of the Treasury, and statutes were passed, all essentially prohibiting banks from paying out gold coin and gold certificates, and requiring under penalty of criminal prosecution the return to banks of all gold and gold certificates. See generally, Roosevelt, Franklin D., The Public Papers and Addresses Of Franklin D. Roosevelt Volume Two, The Year of Crisis 1933 (1938).

During this period of frequent Executive Orders and Treasury Department regulations prohibiting gold coinage as a means of steadying the banking system, the United States Mint at Philadelphia proceeded with presumably pre-existing plans to strike gold coins bearing the date 1933. United States Mint documents establish that no $20 gold coin, or Double Eagles were struck in 1933 at any location other than the Philadelphia Mint. Levine Dec. Ex. B. A total of 445,500 $20 Double Eagle coins

were struck in 1933 bearing that date, having a total face value of $8,910,000; specifically, 100,000 coins ($2,000,000 face value) were struck and delivered to the Mint Cashier between March 15 and March 24, 1933; from April 7 through April 27, 1933, another 200,000 ($4,000,000 face value) were struck, and; from May 8 through May 19, 1933, the remaining 145,500 were struck. Levine Dec. Exs. C and D.

While the United States Mint manufactured 445,500 $20 gold coins dated 1933 bearing the "Double Eagle" design, not a single one of those coins was ever issued or released to the public as legal tender. Nor was ownership of any single 1933 $20 Double Eagle ever legally sold, given, or otherwise transferred from the United States to any person. As of March 6, 1993, payment of gold coin had been prohibited and the Secretary of the Treasury did not defy Presidential Proclamation by issuing any orders placing gold coinage into circulation. The only 1933 Double Eagles that left the Mint lawfully were the two 1933 $20 Double Eagles that were given to the Smithsonian Institute for preservation in the numismatics collection, where they remain to this day, along with two Double Eagles from each prior year such coins were struck. Levine Dec. Ex. E; Barnard, 72 F. Supp. at 532.

This case arises out of the fact that an unknown quantity of 1933 $20 Double Eagles, including the defendant-in-

rem piece, were stolen from the United States Mint and passed into private hands. On or about March 22, 1944, approximately eleven years after President Roosevelt prohibited coining gold as money or currency in this country, the United States Secret Service was asked to investigate a report that a coin dealer, Stack Brothers, Numismatists, 12 East 46th Street, New York, New York, was offering at auction one 1933 $20 Double Eagle gold coin. The Mint advised the Secret Service that its records showed that no 1933 $20 Double Eagles had been circulated as currency, or otherwise legally removed from the United States Mint.[2] Levine Dec. Ex. F; Berke Dec. Ex. S. The Secret Service commenced a thorough and well-documented investigation which ultimately led to the conclusion that the Mint Cashier, George McCann, working in concert with unlicenced and illicit gold dealer Israel Switt and his business partner, Edward Silver, had conspired to steal an unspecified number of 1933 $20 gold coins from the Mint.

**B. The Secret Service Investigation and Seizures of 1933 Double Eagles**

Secret Service agents Jack Haley and Harry W. Strang

---

[2] On April 6, 1944, the Chief of the United States Secret Service received a written confirmation from the Treasury Department that the records of the Treasury Department "do not show that any payments of 1933 Double Eagles were authorized to be made the United States Mint, Philadelphia, to any Federal Reserve Bank or Branch." Levine Dec. Ex. F.

seized a 1933 $20 Double Eagle from Stack Brothers on March 24, 1944. Stacks Brothers was holding this 1933 $20 Double Eagle for auction on behalf of Colonel J. W. Flanagan, who in turn had purchased the coin from B. Max Mehl, a coin dealer located in Fort Worth, Texas. Levine Dec. Ex. G.[3]

Secret Service agents seized another 1933 $20 Double Eagle, also on March 24, 1944 in New York City, from coin dealer Max Bernstein. Max Bernstein told Special Agents Haley and Strang that he had purchased his 1933 $20 Double Eagle from James MacAllister on February 17, 1937 for $1,600. Bernstein further stated that he had acquired another 1933 $20 Double Eagle from a collector named Taylor (who also had acquired it from MacAllister); Bernstein told the agents that this other coin was ultimately resold to Ira Reed of Philadelphia. Mr. Bernstein also gave the agents names of other individuals he believed had 1933 $20 Double Eagles. Levine Dec. Ex. G.

The next day, March 25, 1944, the Special Agents interviewed Messrs. Bell, Boyd and Reed in New York City. Mr. Bell immediately surrendered a 1933 $20 Double Eagle to the Secret Service. Mr. Boyd declined to surrender his coin at that

---

[3] Special Agents Haley and Strang interviewed the owners of Stack Brothers, Joseph and Morton Stack, who produced a letter dated March 16, 1944 from B. Max Mehl indicating that he had sold the coin to Col. Flanagan for $1,250. The Stack brothers also provided information regarding other 1933 Double Eagles possessed by other collectors and dealers. Levine Dec. Ex. H

time, but informed the agents that he had acquired it from James MacAllister. Mr. Reed admitted that he had acquired two 1933 $20 Double Eagles, one of which he sold to Mr. Bell (who had just surrendered it), and he said he could not recall to whom he sold the other. Levine Dec. Ex. G.

On March 29, 1944, Secret Service agents conducted follow up interviews with Reed and MacAllister in Philadelphia. MacAllister, a reputable collector, advised the Secret Service agents that he had purchased five 1933 Double Eagles from Israel Switt. The Secret Service subsequently identified Switt as a gold dealer with a record for violations of the Gold Reserve Act of 1934. United States v. 98 $20 United States Gold Coins, 20 F. Supp. 354 (E.D. Pa. 1937). MacAllister told the agents that he had asked Switt a few times about the source of the 1933 $20 Double Eagles, and that Switt provided several different answers. One story Switt told MacAllister was that he got the coins from an old lady related to a high ranking Treasury Department official; Switt also told MacAllister that he received them from a man named "Norris" connected with the Federal Reserve Bank of Philadelphia. Levine Dec. Ex. I.

On March 30, 1944, Secret Service Agents Harry Strang and George Drescher interviewed Israel Switt at his office in Philadelphia. Swift admitted during this interview that he had had in his possession nine 1933 $20 Double Eagles. Swift further

admitted that he had sold five to MacAllister, two to coin dealer Abe Kasoff in New York, and two others to coin dealer Ira Reed of Philadelphia. Switt professed to have no recollection where or from whom he got the pieces and claimed to have no records regarding his acquisition of them. Switt further admitted that in his capacity as a gold dealer he had often been to the Philadelphia Mint. Swift denied knowing, among others, George McCann, who had been the Cashier of the Mint. Swift signed a sworn statement to that effect. Levine Dec. Exs. J and K.

Further investigation undertaken over the next two years traced the chain of custody and resulted in the recovery of nine 1933 $20 Double Eagles. During the course of the investigation, Secret Service agents, among other things, interviewed coin dealer B. Max Mehl of Fort Worth, Texas. Mehl stated that he had purchased three 1933 $20 Double Eagles -- one from Ira Reed, and two from James MacAllister -- both of whom confirmed that they received the pieces from Israel Switt. Mehl further stated that on February 23, 1944, he sold the 1933 Double Eagle he had purchased from Reed to the King of Egypt through the Egyptian Legation. Mehl sold the other coins to James Flanagan and C. F. and C. M. Williams of Cincinnati, Ohio. Levine Dec. Exs. L and M.

On June 18, 1945, Fred C. C. Boyd, New York, New York surrendered a fourth 1933 $20 Double Eagle to Special Agent

Strang. On June 19 and 20, 1945, the Secret Service seized a fifth and sixth 1933 Double Eagle from James Clarke (through his attorney) and James Stack, respectively. Levine Dec. Ex. N. Clarke and Stack however, filed lawsuits, like Barnard, to recover the pieces but those actions were ultimately dropped and the coins forfeited to the Government. See Stack v. Strong, 112 N.Y.S.2d 197 (Sup. Ct. N.Y. Co. 1952); Levine Dec. Exs. O and P. C. M. Williams surrendered a seventh 1933 $20 Double Eagle on June 20, 1945, after receiving a telegram from Mr. Boyd advising that he had surrendered his. Levine Dec. Ex. Q. The United States recovered an eighth 1933 $20 Double Eagle on August 12, 1947, from L. G. Barnard, at the conclusion of the litigation reported at United States v. Barnard, 72 F. Supp. 531 (W.D. Tenn 1947). The Secret Service was also aware that B. Max Mehl had sold a 1933 Double Eagle to King Farouk. Levine Dec. Ex. L.

The Secret Service further determined from an examination of the canceled checks that Switt received from James MacAllister for 1933 Double Eagles, that Edward Silver, Switt's brother-in-law who also had a gold-buying concession, co-signed the checks with Switt. Subsequent to Switt's 1937 conviction for illegal possession of gold, Switt's gold dealing license was revoked and Silver took over as the licensee. Switt continued to deal in gold under Silver's name. Levine Dec. Ex. R.

Further, MacAllister told the agents that Switt needed

Silver's approval for the sale price of the 1933 Double Eagles that Switt sold to MacAllister. Switt and Silver both consented to additional interviews with the Secret Service in the presence of counsel. They both claimed not to have any records relating to their coin purchases for the year 1937, when they sold nine 1933 Double Eagles. Silver told the investigating agents that he did not know George McCann and did not engage in any coin transactions with the Cashier's office. These statements were flatly contradicted by several Mint employees, including the then current cashier who was the Assistant Cashier under McCann, who stated that Silver and McCann were frequently seen talking together. Levine Dec. Exs. S, T and U. Ultimately, counsel to Switt and Silver refused to say who was the source of 1933 Double Eagles.

On or about October 10, 1944, the agents interviewed George McCann. McCann was no stranger to stealing coins from the Mint, as he had been convicted in 1940 of stealing uncurrent coinage from the Mint, and was sentenced to a term of imprisonment of one year and one day. Among other things, McCann denied having custody of a box of 435 1933 Double Eagles which were returned to the Mint from the Assay Committee. McCann claimed that these coins were at all times held in the sole custody of the Vault Custodian, Edward McKernan. McCann also stated that McKernan was responsible for forwarding two specimens

to the Smithsonian Institute. McCann stated that he knew who Switt was, but did not know Silver. Levine Dec. V.

Evidence gathered by the Secret Service, however, exposed McCann's statements as false. Interviews with McKernan and others revealed that the Assay Committee box was locked with a two-key system and that only the Assayer and the Cashier -- George McCann -- held the keys; McKernan further stated that the Assay Commission's[4] box was kept in the Cashier's working vault and the vault in the Cashier's office. It was further established that George McCann, not McKernan, sent two specimens to the Smithsonian Institute on October 2, 1934, and records establish that those two coins did not come from the sealed Vault containing the bulk of 1933 Double Eagles, but rather came from the pieces returned to the Cashier by the Assay Committee over which McCann had custody and control. These facts were corroborated by the Mint. Levine Dec. Ex. V. George McCann's financial records also revealed large amounts of unexplained cash deposits into his brokerage account between 1935 and 1937. Levine Dec. Ex. W.

The Secret Service investigation had thus established that all of the known, extant 1933 Double Eagles traced back to

---

[4] The Assay Commission performed a quality control function, and routinely examined samples from the Mint production to measure, weight and do other analysis to, among other things, ensure that coins adhered to the strict standards set by the Mint.

Israel Switt. The chain of custody of the nine 1933 $20 Double Eagles that Israel Switt admitted he sold is as follows:

1. Switt → MacAllister → Mehl → Flanagan
2. Switt → MacAllister → Bernstein
3. Switt → Kasoff → Hammel → Reed → Bell
4. Switt → MacAllister → Boyd
5. Switt → Reed → Clark
6. Switt → Reed → James Stack
7. Switt → MacAllister → Mehl→ Williams
8. Switt → Reed → Bell → Trotter → Barnard
9. Switt → MacAllister → Taylor → Bernstein → Reed → (J.F. Bell) → Mehl → King of Egypt

See generally, Levine Dec. Exs. G through FF.

In 1952, Louis Eliasburg, a numismatist, surrendered another 1933 Double Eagle (this was in effect the ninth one recovered). Mr. Eliasburg had purchased a 1933 Double Eagle on April 15, 1944 from Ira Reed, had kept the piece in his possession ever since, but when he "heard that there was a cloud to the title, I decided to surrender the coin." Levine Dec. Ex. GG.

Based upon the impressive evidence collected incriminating McCann, Switt and Silver in the theft of 1933 Double Eagles from the Mint, the Secret Service presented the case to the United States Attorney's Office for the Eastern

District of Pennsylvania for criminal prosecution. The case was declined strictly on the basis of statute of limitations. Levine Dec. HH.

**C. No 1933 Double Eagle Could Have Left the Mint Lawfully**

The Secret Service agents conducted an extensive investigation to determine all possible sources for 1933 $20 Double Eagles to have been taken out of the Mint. Accordingly, the United States Mint conducted a detailed review of its books and records and demonstrated that the last shipment of gold coin from the Mint to any Federal Reserve Bank or branch was made on March 5, 1933; none of the gold coin shipped on that date or at any prior date contained any coin dated 1933; no 1933 $20 Double Eagles were delivered to the Mint's vault until March 15, and; the Federal Reserve Bank of Philadelphia did not receive any coins from the March 5 shipment.

To summarize, Mint records established that:

- 445,500 pieces ($8,910,000) were struck in total;
- 445,000 were placed in sealed vault, Vault F - cage 1, Vault records show they remained in the Vault untouched until February 6 through March 18, 1937, when the melting process began;
- 34 pieces ($680) are noted on the Mint Vault records as having been added to the Vault by the Cashier on February 2, 1934;

- 446 pieces ($8,920) went to the Assay Commission for qualitative analysis. The Commission selected nine of those pieces, which were destroyed during the testing process. It is possible that the theft occurred prior to the assay, and that the thief substituted other gold pieces for the nine 1933 Double Eagles that were to be assayed. There could have been no lawful switching of the pieces to be assayed.

- 435 pieces ($8,700) remaining after the Assay Commission finished its work were returned to the Cashier on or about February 20, 1934. The Secret Service determined from interviews with Mint employees and examination of Mint records that the box containing these pieces was not opened until on or sometime after March 20, 1934 when George McCann became Cashier. McCann had custody of and access to these pieces from March 1934 to February 1937. These pieces were ultimately ordered melted with the pieces as described above.

- 20 pieces of the total struck went to the Director of the Mint and were destroyed during laboratory analysis. 440-443.

- 2 pieces were sent on or about October 2, 1934, by George McCann to the Smithsonian Institute for the numismatic collection.

Levine Dec. Exs. B, C, F, K, M, S, W, X, FF.

It is clear from the above evidence that 1933 Double Eagles could only have been removed from the Mint unlawfully.

The United States never authorized the release of any 1933 Double Eagle from the Mint. There is clear evidence that the pieces were embezzled by George McCann, who spent one year in prison for stealing other uncurrent and unissued coins from the Mint, who had easy access to the 1933 pieces for years, who was seen frequently conversing with Silver who sold the pieces with Switt, and who provided the investigating agents with false statements regarding the assay process. Someone connected to the Assay Commission also could have "switched" another gold coin for one of the 1933 Double Eagles. In any event, the proof definitively rules out any possible lawful or legal means any 1933 Double Eagle could have been removed from the Mint.

**ARGUMENT**

**I. THE DEFENDANT-IN-REM 1933 DOUBLE EAGLE IS STOLEN PROPERTY**

Faced with the Government's overwhelming and undisputed proof that all 1933 Double Eagles in private hands were stolen from the Mint, Fenton has attempted to redefine the central issue in this lawsuit as having to do with whether or not the defendant-in-rem piece is the one King Farouk purchased in 1944. However, whether or not the defendant-in-rem 1933 Double Eagle is the same one possessed by King Farouk is irrelevant to any issue in this case. It is a "red herring" argument designed to deflect attention away from the extensive evidence establishing that <u>all</u> of the 1933 $20 Double Eagles in private hands were stolen from

the Mint -- as the Barnard court held in 1947 -- and therefore are property belonging to the United States.

Fenton contends that even if the Government establishes that the defendant-in-rem 1933 Double Eagle was stolen from the United States Mint, he should nonetheless retain possession of it because it was not "stolen property" within the meaning of 18 U.S.C. § 2314, the National Stolen Property Act, at the time Fenton imported it into this country to sell it for approximately $1.5 million. Br. at 2. To reach this conclusion, Fenton argues that the particular 1933 $20 Double Eagle the United States Secret Service seized from him at the time of his arrest IN February 1996 at the Waldorf Astoria Hotel, New York, New York, is the same 1933 $20 Double Eagle that had at one time been possessed by King Farouk of Egypt, Br. at 18-25, and that this particular specimen "lost" its status as stolen property in 1944 when the United States briefly "regained possession" of it and issued an export license to King Farouk permitting him to export it to Egypt. Br. at 3, 32-. These arguments may have simplistic, surface appeal but they are based on a profound distortion of the facts and misapplication of the law and should be rejected.

**A. Whether the Defendant-in-Rem 1933 Double Eagle Is the Same One Previously Possessed By King Farouk Is Irrelevant, and In Any Event Is a Genuine Question of Material Fact Precluding Summary Judgment**

Fenton's "King Farouk" defense rests and ultimately fails as a threshold matter on Fenton's ability to demonstrate by a preponderance of the admissible evidence that the defendant-in-rem 1933 $20 Double Eagle is the same one previously possessed by King Farouk.[5] Putting aside whether it makes any difference which particular stolen 1933 $20 Double Eagle is involved in this case, summary judgment could not be granted to Fenton because there is a genuine question of fact as to whether or not the defendant-in-rem 1933 Double Eagle is the King Farouk coin.

Fenton proffers in support of his motion the deposition testimony and various documents produced by British coin dealer, Andre de Clermonte, who brokered the sale of a 1933 Double Eagle to Fenton. Fenton and de Clermonte jointly purchased, in some cases with Fenton's funding, various coins from a Middle Eastern

---

[5] Fenton unavailingly argues that the Government bears the burden of proving that the defendant-in-rem 1933 Double Eagle is not the King Farouk coin. This is wrong. The government has established probable cause that all 1933 Double Eagles, including the one King Farouk possessed, were stolen from the Mint, and were knowingly imported into this country as stolen property and be means of materially false statements on Customs forms. Under the procedural rules applicable to forfeiture actions, the burden shifts to Fenton to demonstrate his defenses by a preponderance of the evidence. Thus, it is Fenton's burden to prove that the defendant-in-rem 1933 Double Eagle is the King Farouk coin, not the Government's burden to "disprove" it.

jeweler named between 1993 and 1995. Fenton and de Clermonte either shared the profits, or de Clermonte would receive a commission on the sale to Fenton. Mr. de Clermonte testified that identified himself as a jeweler for the family of a former "Colonel" in the Egyptian army who had been a close associate of General Nasser and had participated in the overthrow of King Farouk. Br. at 19; Levine Dec. Ex. II, Deposition of Andre de Clermonte at p. 74. Mr. de Clermonte stated that he believed the Colonel acquired coins, including a 1933 Double Eagle, from the King Farouk collection. De Clermonte Dep. at 111. Mr. de Clermonte stated that he asked about a "rare" $20 gold piece that was withdrawn from the auction and then proceeded to produce a 1933 Double Eagle. Mr. de Clermonte produced invoices for all the coins he and Fenton jointly purchased from -- except for the 1933 Double Eagle -- and he matched them more or less with the lots of King Farouk's collection as described in the Sotheby's auction catalogue prepared in for the 1954 auction. Br. at 20-21. This testimony, and the documents, Fenton says, establish beyond question that the defendant-in-rem 1933 Double Eagle is the King Farouk coin.

While the issue is irrelevant, it is also anything but undisputed. First, Mr. de Clermonte's testimony tracing the defendant-in-rem 1933 Double Eagle to the King Farouk collection

consists almost entirely of inadmissible, multi-layered hearsay. Mr. de Clermonte testified as to statements allegedly made to him by , who was repeating statements allegedly made to him by unnamed "clients," who inherited a coin collection from their unidentified father, who conveniently for Mr. Fenton's factual allegation in this case, was a "Colonel" in the Egyptian army who was reportedly close to General Nasser and who, because of his position in the Egyptian army, was supposedly able to acquire pieces of the King Farouk numismatic collection. De Clermonte Dep. at 72-75; 110-113. Mr. de Clermonte does not know the name of the "Colonel" nor does he know the names of any of the Colonel's heirs or family members, and indeed, he never asked for any names. Id. at 72. Mr. de Clermonte does not know how the "Colonel" came to possess any of the pieces that were from the King Farouk collection. Id. at 73. As Mr. de Clermonte put it, the sole source of his knowledge regarding the coins he and Fenton allegedly purchased from , including the 1933 Double Eagle, was: "Only the version that I received from , that this man [the "Colonel"] was a collector and he both bought at the sale and acquired afterwards. That is only hearsay. I do not know for a fact." Id. at 111.

The hearsay testimony of Mr. de Clermonte does not establish as a matter of undisputed fact that the defendant-in-rem 1933 Double Eagle is the King Farouk piece. The King Farouk

piece was withdrawn from the 1954 auction in Cairo. Fenton 56.1 Statement ¶ 20; Levine Dec. Ex. JJ. In fact, Mr. de Clermonte's copy of the Sotheby's auction catalogue, contains a handwritten notation at the entry for the 1933 Double Eagle, on page 26, Lot 185, where the 1933 Double Eagle listing is circled and has the word "withdrawn" written directly beneath the number "1933." Berke Ex. CC.

Prior to the auction, the United States demanded that the 1933 Double Eagle be returned. Levine Dec. Ex. JJ. The Egyptian Government withdrew the 1933 Double Eagle from the auction, and considered the United States' request, but ultimately the piece was not returned. The American Embassy in Cairo reported back to the State Department that an American citizen had purchased the remainder of Lot 185 and confirmed that the auctioneer stated that the 1933 Double Eagle was withdrawn at the request of the American Government. Levine Dec. Ex. JJ. However, exactly what happened to the 1933 Double Eagle after that is in question. Mr. de Clermonte has no personal or otherwise reliable knowledge of what happened to the King Farouk 1933 Double Eagle. He speculated at his deposition that the "Colonel" purchased it at or possibly after the auction; or perhaps General Nasser gave the "Colonel" a gift. In the last analysis Mr. de Clermonte clarified that he had "no idea" whether a "Colonel" had actually purchased a 1933 $20 Double Eagle at the

auction, and in truth he has no idea where really got the piece. Dep. at. 113.[6] For all one knows, the "Colonel" may have stolen the piece from the Egyptian Government.

Fenton's assertion that the defendant-in-rem 1933 Double Eagle is the King Farouk specimen is also called into question by the very invoices and other documentation provided by Mr. de Clermonte. Fenton demonstrates how the purchases from match up with the lots in the Sotheby's King Farouk auction catalogue. Br. at 19-25. The paperwork Mr. de Clermonte created with respect to the purchases from was detailed, specific, and fairly complete. The terms were carefully recorded; the particular coins being purchased were described with dates, names and other specific identifying information. The financial terms, such as percentage of profit share or commission between Fenton and de Clermonte, were recorded and spelled out. See De Clermonte Dep. Exs. 2 and 2A. However, in glaring and telling contrast, Mr. de Clermonte does not have a **single piece of paper specifically referring to a "1933 $20 Double Eagle" or any other variation of that name.** De Clermonte Dep. at 227-228 ("Q: Mr. de Clermonte, there is not a single document in here, the packet that we have just spent the

---

[6] Mr. de Clermonte insisted on a confidentiality agreement to protect against public release of name because, as he stated, he did not want to "cause him considerable embarrassment" or damage any future business relationship with . De Clermonte Dep. at 350.

whole day going through [Exhibits 2 and 2A], that refers to the 1933 Double Eagle? A: Right."). A review of Mr. de Clermonte's testimony, the discussion in Fenton's brief, and the chart annexed as Exhibit EE to the Berke Declaration, all reveal that there is no mention anywhere of a 1933 Double Eagle. There is no contemporaneously created sales confirmation, invoice or other document specifically referring to a 1933 $20 Double Eagle. Fenton and de Clermonte have produced detailed documentary proof of purchases of **other** coins and other objects that were at one at one time part of King Farouk's numismatic collection, but have nothing specifically relating to a 1933 $20 Double Eagle. The absence of documentation for the 1933 Double Eagle raises a genuine question as to the true source of this particular coin.[7]

---

[7] It should be noted that Mr. de Clermonte and Fenton established specific financial profit sharing or commission arrangements with respect to each of the pieces they purchased from -- except for the 1933 Double Eagle. Notably, for this particular piece -- which is without question the most valuable and rarest one they purchased -- they did not agree upon a particular percentage of profit sharing. Mr. de Clermonte testified that his arrangement with Fenton on this piece was "that when he sold it I would get a commission or a percentage. We did not fix a percentage. He just said that I would earn money from it when he sold it." De Clermonte Dep. at 262. Mr. de Clermont professed that his reason for entering into a nonspecific arrangement with respect to the 1933 Double Eagle was that he was not "greedy" and that Fenton tole him, "Andre, I will look after you. You will do very well if we sell the coin well.'" Id. At 264. Fenton imported the 1933 Double Eagle for the purpose of selling it for $1.5 million. Even if Fenton had to pay commissions to Japser Parrino, his agent for the U.S. sale, de Clermonte and Fenton would have made a large profit, given that Fenton only paid $210,000.

It further indicates that Fenton and de Clermonte treated the 1933 Double Eagle very differently from all the others they purchased from ; they intentionally did not create any paper trail for the 1933 Double Eagle, strongly suggesting at least that both men were aware that the 1933 Double Eagle was stolen property belonging to the United States.[8] In sum, the notable absence of documentary proof, combined with the hearsay nature of Mr. de Clermonte's testimony, and the numerous credibility issues raised, render this entire issue open to question and therefore inappropriate for resolution on summary judgment.

---

[8] Mr. de Clermonte reluctantly admitted at his deposition that he was aware of the history of the 1933 Double Eagle and knew that the United States wanted all such coins to be returned to the Government. Initially, he claimed that his sole source of knowledge regarding the 1933 Double Eagle was the American Redbook and that all he knew about the piece was that it was "rare." Dep. at 235. He then conceded that he had "heard" that the Mint had tried to get such coins back. Id. at 235-6. He stated that he had "heard" that "people had [1933 Double Eagles], collectors, but they did not sell them openly but to each other, but they were sold." Id. at 237. He then clarified, "I understood that the American Government would like to buy them back or have them back." Id. at 237. On further questioning, Mr. de Clermonte explained that his uncle, also a coin dealer, was familiar with the history of 1933 Double Eagles and had told him the story many many years ago. Id. at 239. Finally, Mr. de Clermonte admitted that he had heard "that because America came off the Gold Standard -- this is what I heard, not what is necessarily the truth -- the Government decided they did not want to release the 33's and they tried to get them back again. That is what I understood." Id. at 240.

### B. Even If The Defendant-In-Rem 1933 Double Eagle Is The King Farouk Piece, It Is Nonetheless Property Stolen From the United States and Never Lost Its Status As Stolen Property

Even though there is a genuine question of fact as to whether the defendant-in-rem 1933 Double Eagle is the King Farouk specimen, it is a question that need not be resolved in this lawsuit, because even if it is, it is nonetheless forfeitable to the Government under all three theories asserted in the complaint -- the Stolen Property Claim, the False Statement Claim and the Superior Title Claim -- as illegally imported stolen property, and stolen property to which the United States holds superior title.

To get around these points, Fenton argues that the Government's Stolen Property forfeiture claim fails as a matter of law because the Government granted King Farouk an export license in February 1944 and because the King Farouk 1933 Double Eagle "lost" its status as stolen property within the meaning of the National Stolen Property Act, 18 U.S.C. § 2314, when the Government regained temporary possession of it in connection with the issuance of the export license. As demonstrated below, this argument unravels beneath the weight of the facts and is based on misapplication of the law.

#### 1. The Relevant Facts

One of the 1933 Double Eagles traced to Israel Switt

and Edward Silver as having been stolen from the United States Mint ultimately came into the possession of King Farouk of Egypt. An export license permitting the Royal Legation of Egypt to export the piece to Egypt was issued on March 11, 1944. The King Farouk export license was issued weeks before the relevant officials at the Treasury Department and the Mint came to realize that no 1933 Double Eagles were ever issued to the public and that the only way they could have left the Mint was through theft.

The undisputed evidence shows that Switt and Silver sold five stolen 1933 Double Eagles to James MacAllister, and that MacAllister sold one of those pieces to B. Max Mehl, who in turn sold it on February 3, 1944 to King Farouk through the Royal Legation of Egypt. The sale from Mehl to King Farouk took place in the United States and was conducted through the Royal Legation of Egypt in Washington, D.C. On February 25, 1944, the Royal Legation of Egypt presented the 1933 $20 Double Eagle that it had purchased from B. Max Mehl to the Treasury Department seeking a license to export the coin to Egypt for King Farouk's collection.

The export license was required under the extensive gold restrictions which had been in effect since March 1933. The applicable Executive Orders and Treasury Department regulations in existence in 1944 still required delivery to the United States of all gold coin and other gold, with certain very narrow

exceptions, including an exemption permitting the export of gold coin having a recognized value to collectors of rare and unusual coin. The Treasury Department had delegated to the Gold Unit at the United States Mint the responsibility for determining numismatic questions relating to export of gold coin.

On February 25, 1944, the Director of the Mint had the 1933 Double Eagle presented by the Royal Legation of Egypt hand delivered to Theodore Belote, the Curator of History at the Smithsonian Institute (then called United States National Museum). Mr. Belote was asked to state: a) whether the coin was of recognized special value to collectors of rare and unusual coin prior to the issuance of the December 28, 1933 Order of the Secretary of the Treasury -- which had required the delivery to the United States of all gold coin -- and whether the coin had been of such special value at all times subsequent, and b) whether the coin was of such special value immediately prior to issuance of the April 5, 1933 Executive Order, and has been of such value at all time subsequent thereto. Berke Dec. Ex. Q.

Mr. Belote looked at the specimen and, on the spot, issued his opinion that the coin was of recognized special value to collectors of rare and unusual coin immediately prior to December 28, 1933 and immediately prior to April 5, 1933 and has

remained of such significance since then.[9] Unfortunately, as officials at the Treasury Department and the United States Mint would discover only a few weeks later, after the coin had been exported to Egypt, Mr. Belote's opinion was made without knowledge of a critical piece of information. As the United States Secret Service and the United States Mint later realized, none of the 1933 $20 Double Eagle that were struck by the Mint were ever legally issued or circulated as currency or in any other manner, and in fact an unknown quantity of 1933 $20 Double Eagles had been stolen from Mint. Thus, the 1933 $20 Double Eagle presented by King Farouk, as well as any and every other 1933 $20 Eagle coin held in private hands, was unissued coin and stolen property belonging to the United States. What Mr. Belote and the United States Mint employees did not know and did not realize in February 1944 was that these coins could not be within the "rare coin" exemptions to the December 28 and April 5 Executive Orders, as they had never been made available to any member of the public; they were not "coins" but rather goods or chattel belonging to the Government which had never been legally placed into the hands of any private person and had been in fact

---

[9] Berke Dec. Ex. S, the February 25, 1944 letter from the Mint to the Smithsonian, reflects that Belote rendered his opinion in a handwritten note the same date that Mrs. Fayles, secretary to the Director of the Mint, brought the coin to him. It appears his examination was cursory and that he returned the coin immediately back to Mrs. Fayles.

*stolen* from the Mint vault. Based on Mr. Belote's incorrect conclusion regarding the coin presented by the Egyptian Royal Legation, export license TGL-170 was issued to King Farouk on February 29, 1944. The Egyptian Royal Legation picked up the coin from the Mint on March 11, 1944. Berke Dec. Ex. S.

As detailed above, on March 22, 1944, a few weeks after the exportation to Egypt, the United States Secret Service first became aware that 1933 $20 Double Eagles were being advertised for sale even though no such coin had ever been paid out by the Mint or otherwise legally issued or circulated out of the Mint. On March 30, 1944, the Acting Director of the Mint sent a memo to the Chief of the United States Secret Service recounting the events leading up to issuance of the export license to King Farouk, and explained that it appeared that:

> Mr. Belote did not have information in his possession which would indicate whether or not these coins had ever been paid out from the Treasury. In fact, Mr. Belote may have had the impression that they had been paid out because the Mint forwarded two of the above-mentioned coins [1933 $20 Double Eagles] to Mr. Belote for the Smithsonian Collection.

Berke Dec. Ex. S. The Acting Director of the Mint further explained that he first became aware of the illicit removal of 1933 $20 Double Eagles from the Mint in response to a routine inquiry regarding the number of such coins that had been placed in circulation, a realization he unfortunately came to <u>after</u> the export license had been issued. When he checked the records and

learned that none had ever been issued in circulation, he notified the Secret Service, thus commencing the intensive investigation and recovery effort that resulted in the seizure and recovery of nine of the stolen 1933 Double Eagles as described above. It is thus abundantly clear from the documentary record that at the time the Government was temporarily in possession of the King Farouk coin, and at the time the export license was granted, the Government had not discovered the theft and did not realize that the coin was not a "rare coin" exempted from the gold restrictions, but was stolen property.

Moreover, the evidence establishes that in March 1944 once the United States Mint and the Secret Service realized that certain 1933 $20 Double Eagle coins were circulating among dealers and collectors, the Government launched a recovery effort leading to ultimate recovery of nine 1933 $20 Double Eagles. Fenton misleadingly argues that the Government made no efforts to recover the King Farouk coin, but the evidence demonstrates otherwise. The documents annexed to Fenton's motion papers illustrate the consistent desire on the part of the United States Government and the steps taken within the Government toward recovering the King Farouk 1933 Double Eagle. The documents reflect that on May 4, 1944, General Counsel to the Treasury Department opined that "it would be proper to attempt by

diplomatic representations to have that coin returned to the United States." Berke Dec. Ex. T. Accordingly, in September 1949, the Treasury Department drafted for State Department review a letter addressed to Egypt demanding return of the King Farouk 1933 Double Eagle. However, the State Department advised that it was politically unadvisable at that time to raise the matter with Egypt and that particular demand letter was not sent.[10]

In late 1953, after the military overthrow of the Egyptian monarchy, the Government renewed its efforts to regain possession of the Farouk 1933 Double Eagle. When the United States learned that the new Egyptian Government intended to auction off the possessions of ex-King Farouk to raise money for the Egyptian public coffers, demand was made. In December 1953, the State Department sent an instruction to the American Embassy regarding the 1933 Double Eagle. Again, on January 27, 1954, another instruction was sent to the Embassy in Cairo stating:

> The Embassy should request that the coin be withheld from sale and that it be returned to the United States Department of the Treasury.
>
> For the Embassy's information, the Treasury Department is seriously concerned at the possibility of the sale of this coin. If it is not withdrawn from sale, the Department of the Treasury will probably issue a press release in Washington warning that the coin will be seized if it is brought to the United States.

---

[10] Given the tense international climate at the end of World War II, the political decision not to make demand of ally of the United States is easily understandable, and international diplomacy is an area ordinarily not subject to judicial review.

Levine Dec. Ex. JJ. Further reports from the American Embassy confirmed that the 1933 Double Eagle had been withdrawn from the auction. Berke Dec. Ex. Y; Levine Dec. Ex. JJ. The Egyptian Ministry of Foreign Affairs sent a letter to the American Embassy in Cairo confirming that the 1933 Double Eagle was withdrawn from auction pending a decision. The Egyptian press reported a decision by the Egyptian government to return the coin to the United States, but as of March 31, 1954, the Embassy reported that it was "in constant touch with Dmitri Rizk Hanna, Acting Director of the Administrative Department of the Ministry of Foreign Affairs, on the subject of the return of the $20 gold coin but so far has been unable to obtain any information other than that the matter is under consideration." Levine Dec. Ex. JJ. The United State appears not to have ever received a response to its demand, nor did we receive the 1933 Double Eagle back from Egypt.[11]

---

[11] It is not clear what legal point, if any, Fenton is trying to make at pages 15-16 in his brief where he erroneously asserts that the United States did not "timely" seek return of the King Farouk specimen. Not only is the point factually incorrect, but it is well settled that a laches defense is unavailable against the Government. Costello v. United States, 365 U.S. 265, 281 (1961) (Supreme Court has "consistently adhered" to the principle that "laches is not a defense against the sovereign"); see also United States v. Gordon, 78 F.3d 781, 786 (2d Cir. 1996); United States v. RePass, 688 F.2d 154, 158 (2d Cir. 1982).

### C. The Export License for the King Farouk 1933 Double Eagle, Issued Prior To Discovery of the Theft, Did Not Change the Piece from Stolen Into Non-Stolen Property.

Fenton argues that the King Farouk 1933 Double Eagle cannot be stolen property because the Treasury Department issued an export license to King Farouk on March 11, 1944. However, Fenton's argument, putting aside for the moment the question of whether the defendant-in-rem 1933 Double Eagle is the King Farouk specimen, fails to account for the fact that the export license was issued before the theft of 1933 Double Eagles from the Mint was discovered. None of the Government employees involved in the export license process realized that no 1933 Double Eagles had been publicly released. The Mint and Secret Service concluded only a few weeks after the export license was issued that Dr. Belote was possibly mislead by the presence of two 1933 specimens in the Smithsonian Numismatic collection which housed examples of all previously issued Double Eagles, among other coins. Berke Dec. Ex. S. Whatever Dr. Belote was thinking, he was unquestionably not aware that years earlier the Cashier had stolen 1933 Double Eagles from the Mint safe.

An export license granted under these circumstances could not and did not transform the 1933 Double Eagle into non-stolen property. There is no legal or rational support for the notion that stolen goods become exempt from the forfeiture laws if they are exported or imported pursuant to Government licenses

or approvals duly issued, but without knowledge that the goods are stolen property. Further, the regulation governing export licenses did not require an adjudication or determination as to whether the gold being exported was stolen property, and no such finding was made in connection with issuance of the King Farouk license. See Berke Exs. O and R. The mere issuance of an export license issued, at a time prior to discovery of the theft, did not render the 1933 Double Eagle "non-stolen" property for purposes of forfeiture. Fenton cites to no case even remotely supporting such an irrational proposition.

In fact, Fenton cites to only one case, United States v. McClain, 545 F.2d 988 (5th Cir. 1977), as support for the overbroad and fallacious proposition that goods covered by an export license cannot be considered stolen property for purposes of the 18 U.S.C. § 2314, the National Stolen Property Act. This is simply not the law and it is not the holding of McClain.

McClain involved a prosecution under the National Stolen Property Act for illegal transportation and receipt in interstate commerce of stolen pre-Columbian artifacts. The pre-Columbian artifacts in McClain were declared to be the property of Mexico by legislation which declared the Republic of Mexico to be the owner of all pre-Columbian artifacts recovered from Mexico. The defendants in McClain were charged with transporting and receiving artifacts illegally exported from Mexico that had

been legislatively declared to be owned by that nation. The defendants argued that the artifacts had not been "stolen" in the traditional sense of the word, and that the NSPA did not apply to violations of foreign patrimony laws. The Court disagreed, holding that the term "stolen" as used in the NSPA had a broad and wide-ranging meaning. United States v. McClain, 545 F.2d at 995. The Court held that the term stolen was broad enough to encompass the illegal exportation of artifacts declared by Mexican law to be the property of Mexico. McClain, 545 F.2d at 996. The Court noted that a declaration of national ownership over property was necessary before the mere illegal exportation of an article could be considered theft within the NSPA. The case was remanded on other grounds relating to errors committed in the jury instructions regarding matters of Mexican law.

Fenton surmises that "the [McClain] Court assumed that any artifact for which such a license or permit had been granted was not stolen property under the NSPA." Br. at 39. However, there is absolutely nothing relating to this point in McClain nor can that conclusion be inferred from the case. On the contrary, McClain effectively draws the distinction between "possession" and "ownership," illustrating that a Government's power to regulate the exportation of goods does not in and of itself create titled ownership rights in the Government. McClain 545 F.2d at 1002. Conversely, the issuance of an export license does

not convey title to the license recipient and certainly cannot be interpreted as an adjudication of whether the goods exported are stolen or not.

Fenton urges this Court to, in effect, turn a determination by Belote (quite possibly erroneous), that a 1933 Double Eagle was of recognized value to collectors and therefore exempt from the laws in effect at the time prohibiting possession of gold, into the granting of title. Fenton argues that the Government obtained title to all gold coins in 1933 through the gold regulatory system (analogizing those laws to the kind of patrimony laws discussed in McClain) that began with Presidential Proclamation of a Bank Holiday, but that the regulations and statutes recognized an exemption for coins of recognized value to collectors of rare coins. Because an export license was granted for the King Farouk 1933 Double Eagle based on Dr. Belote's assessment that it was within the exemption, Fenton argues, the Government authorized the lawful possession by King Farouk. Br. at 34-39.

This argument rests on a fundamental fallacy -- a fallacy that pervades Fenton's entire analysis of this case. Fenton incorrectly presumes that the United States became the legal owner of 1933 Double Eagles by virtue of the Executive Orders, Regulatory Orders and statutes enacted requiring the delivery to the United States of all gold which was already in

circulation and, prior to the gold regulations, was lawful to possess. Fenton fails to apprehend that the United States' legal ownership of all 1933 $20 Double Eagles derives from an independent, even simpler source -- the United States Mint struck the 1933 Double Eagles and because they were never legally issued out of the Mint (except for the two that are in the Smithsonian), they are and all times have been Government property. The Government's claim of ownership in this case arises wholly separate and apart from the 1933-34 gold regulations; every 1933 Double Eagle struck by the Government has at all times remained property of the United States. Thus, the United States ownership of 1933 $20 Double Eagles did not first vest, as Fenton incorrectly contends, when the United States issued laws and orders requiring delivery of gold coin. The United States became owner of the defendant-in-rem 1933 Double Eagle the moment it was struck.

Dr. Belote could not have known that the coin was stolen (the theft had not yet been uncovered) when he opined that the King Farouk coin was except from regulation based on its value to collectors. Presumably 1933 Double Eagles illegally removed from the Mint should not have been within the "rare coin" exemption to the applicable gold regulation. However, Dr. Belote's opinion did not render the King Farouk 1933 Double Eagle, or any other Double Eagle, non-stolen property. His

opinion is irrelevant to that issue and to any other issue in this proceeding. While it appears that the phrase "coin having recognized special value to collectors of rare and unusual coin" should not have been applied to 1933 Double Eagles, Belote's opinion (and the subsequent granting of the export license) merely protected King Farouk from allegations of violating the export laws. It did not transfer title; ownership was not a factor considered by Belote, nor by the Treasury Department. The export license is meaningless to demonstrate ownership. If, for instance, if Mehl later alleged that King Farouk had stolen the 1933 Double Eagle from him, the export license would hardly be considered probative of King Farouk's title.

**D. The Government's Brief Possession of the King Farouk 1933 Double Eagle In Connection With the Export License, Prior to Discovery of the Theft, Did Not Change Its Status From Stolen to Non-stolen Property**

Fenton also argues that the King Farouk 1933 $20 Double Eagle should no longer be considered stolen property because under a long held common law rule stolen goods lose their status as stolen upon being recovered by the police. Here, Fenton principally relies on a Sixth Circuit case, United States v. Monasterski, 567 F. 2d 677, 681 (6th Cir. 1977), and several other cases that have cited Monasterski for this principle. The Monasterski rule is entirely inapplicable to this case, as there was no recovery of stolen goods by police in this case, rather an

unknowing temporary possession by the Treasury Department. Moreover, a majority of the Circuits have greatly narrowed the Monasterski rule so that it is inapplicable even in situations where police, usually in undercover operations, possess stolen property briefly during the investigation. The rule certainly has no application where stolen property is briefly possessed by Government employees who are not aware that the property is stolen.

In Monasterski, Conrail police and FBI agents arrested two young men with stolen tires; the police and FBI agents then obtained cooperation of the thieves in catching the individual to whom they were going to sell the stolen tires. The agents marked the tires, the young men sold them to the defendant, and he was arrested for receiving stolen property. United States v. Monasterski, 567 F.2d at 681. The Court held that the defendant could not be convicted of violating 18 U.S.C. § 659 because the tires ceased being stolen goods when the police recovered them. Monasterski, 567 F.2d at 681. The Court interpreted the term "stolen property" as used in 18 U.S.C. § 659 to have the same meaning as under the common law rule that "one cannot be convicted of receiving stolen goods when actual physical possession of the stolen goods has been recovered by their owner or his agent before delivery to the intended receiver." Id. at

684.[12]

Each case Fenton cites for this common law rule involves a criminal prosecution where the police recover stolen goods, knowing they are stolen, and the goods are then delivered to another person who believes the goods to be stolen. See e.g., United States v. Warshawsky, 20 F.3d 204 (6th Cir. 1994); United States v. Cawley, 255 F.2d 338 (3rd Cir. 1958); State v. Hageman, 296 S.E.2d 433 (N.C. 1982). Fenton does not cite, nor has the Government found, any case in any state or federal jurisdiction applying this principle where the police, no less a Government licensing agency, possesses property without knowing at the time of possession that the property is stolen. Nor is the Government aware of any case applying the Monasterski rule to a forfeiture case.

The absence of any legal precedent on this point is because such an application is unwarranted and absurd. Under Fenton's rendition of the law, stolen property transported by the United States Postal Service would actually lose its character as stolen property because it is handled and actually physically possessed by Government employees, even though those employees do not know the goods are stolen. Put another way, Fenton's

---

[12] A defendant can nonetheless be convicted of conspiracy and/or attempted receipt of stolen property even if there is a full recovery of the stolen goods by the police. United States v. Warshawsky, 20 F.3d 204, 208 (6th Cir. 1994).

interpretation would dictate that imported stolen property passing through United States Customs and possessed by Customs Agents also ceases to be stolen property, even though the agents are unaware the goods are stolen, or even if the license applicant falsely claims to be the true owner. Clearly, the law does not authorize the kind of "trick" Fenton advocates here -- the Government's temporary possession of stolen property at a time when the theft of that property had not yet been detected cannot be deemed to have altered the stolen nature of the property.

Moreover, the common law rule discussed in Monasterski has been substantially curtailed and limited by virtually every Circuit to have considered it, including the Second Circuit. Courts have consistently interpreted the rule to cover only situations where the police have taken complete physical possession and control over the goods and to exclude situations where police have observed, surveilled, or have had only had brief temporary custody of goods in the course of an undercover operation. In United States v. Muzii, 676 F.2d 919, 922 (2d Cir. 1982) the Second Circuit rejected a rote application of Monasterski and held:

> Our analysis of the relevant case law leads us to the conclusion that the brief custody of the goods by the detectives at the trucking company did not amount to "recovery" of the drugs for their rightful owner and eliminate the stolen character of goods.

The Court explained that the term "recovery" did not encompass the kind of brief possession that merely facilitated the surveillance of the stolen property and was no more than a small part of the overall undercover scheme. United States v. Muzii, 676 F.2d at 922; see also, United States v. Johnson, 767 F.2d 1259, 1267-69 (8th Cir. 1985) (following Muzii); United States v. Dove, 629 F.2d 325, 333 (4th Cir. 1980) (holding "it is clear that this requirement of 'actual, physical possession' by the true owner, his actual agent or his presumed agent, the police officer, is to be strictly applied before stolen property shall be relieved of that taint," in case where undercover possessed goods in course of investigation); United States v. Egger, 470 F.2d 1179 (9th Cir. 1972) (same); Copertino v. United States, 256 F. 519 (3d Cir. 1919) (same); see also People v. Dabrowski, 162 Ill. App. 3d 684, 515 N.E.2d 1345, 1352-1353 (App. Ct. Ill. 1987) ("[i]n determining whether stolen property loses its status as stolen once it is identified by the police, the test is whether the police took possession of the property with the intent to recover it on behalf of its rightful owner"), citing United States v. Johnson, 767 F.2d at 1268.

The rule that stolen property "loses" its status as stolen has been applied in only the most limited circumstances and has not been expanded to encompass uniformly to all Governmental possessions. The rule does not even apply to all

"knowing" possession, and has never been applied as Fenton urges the Court to do here, to cover a situation where Government employees come into possession of stolen Government property prior to discovery of the theft and without having knowledge that the goods are in fact stolen.

**E. In Any Event, The Export License and Government Possession Did Not Convey Title**

Fenton directs his summary judgment arguments regarding the export license exclusively to the Government's two forfeiture claims and not to the Government's Superior Title Claim. This is because, putting aside the issue of whether the 1933 Double Eagle lost its status as stolen property for purposes of 18 U.S.C. 2314, the export license did not and cannot be deemed to have conveyed title and ownership of the 1933 Double Eagle to King Farouk. An export license does not transfer title to goods under any circumstances. The export license issued to King Farouk did not convey title to him, particularly since the license was issued without knowledge that the 1933 Double Eagle was stolen. The export license process involved no adjudication of ownership or title. The Government employees involved in the export license process had no legal authority to adjudicate ownership or to convey title of stolen Government property to another person. Government officials may only act within the limits of their authority, and the officials involved did not have the authority

to convey title to King Farouk, any more than would have had authority to "give" away Government office equipment.

The evidence establishes that King Farouk ultimately acquired the 1933 Double Eagle in the United States from a thief; he did not possess clear title to the piece and under long standing legal principles applicable to this case one cannot acquire good title from a thief. United States v. Barnard, 72 F. Supp. 531.[13] The export license did not alter this. Even if the

---

[13] The Government notes that the Barnard case, decided in 1947, deflates the "parade of horribles" argument raised by the Professional Numismatics Guild ("PNG") in its amicus curiae brief submitted in support of Fenton's motion. PNG is a trade association of professional dealers, like Fenton, and PNG's members have an obvious interest in the private trade of rare and collectible coins. PNG incredulously tells this Court that "a decision in favor of the Government in this case would have a substantial negative impact on all participants in numismatics, from individual collectors to large auction houses." PNG Br. at 2. PNG apparently believes that if the United States recovers this particular piece of stolen property, numismatists everywhere will have reason to fear rampant uncontrolled Government seizures of "literally thousands" of pattern coins. PNG's brief fails to recognize, however, that the Barnard ruling, granting the United States title to a 1933 Double Eagle, has been controlling federal precedent for 53 years. PNG incorrectly describes the instant case as the first time the Government has sought seizure of "unissued coins." This is false. The Government seized nine other 1933 Double Eagles between 1944 and 1952, with at least three of the seizures resulting in litigation. The Barnard case, decided in 1947, certainly did not inflict a "chill" of any kind on numismatics, nor is there any rational basis to fear that result here.

In addition, PNG's brief utterly fails to account for the critical distinction between pattern coins, presentation pieces, special proofs and medals, which were struck by the Mint and offered to the public although not as currency, and pieces such as the defendant-in-rem 1933 Double Eagle which was never lawfully offered to any member of the public but rather was

export license is regarded as having stripped the 1933 Double Eagle of its stolen character for purposes of the National Stolen Property Act and the Government's forfeiture claims, it nonetheless did not convey clear title and ownership rights to King Farouk, and is thus irrelevant to the Government's Superior Title Claim.[14]

In summary, the export license is irrelevant to any

---

stolen from the Mint coffers. It is obvious from PNG's brief that PNG is not familiar with the facts of this case. PNG offers some interesting, although irrelevant, information about the Mint's production and sale to private individuals of pattern coins and other non-currency pieces struck by the Mint. PNG Br. 6-10. Pattern coins and the like, however, are pieces that the Mint voluntarily and willfully sells to collectors, or as PNG recounts, gives to dignitaries. But this case is not about a pattern coin, or a mistakenly produced coin, nor is it about a piece that mysteriously left the Mint under totally unknown circumstances, as PNG incorrectly asserts. In this case the United States seeks the return of stolen property. PNG's contention that recovery of stolen property by the United States "would be a disaster for numismatics and the public generally" is ludicrous and should be ignored by this Court.

[14] Although he does not label it as such, Fenton's argument concerning the export license is in effect an argument that the Government is collaterally estopped from seeking recovery of the King Farouk 1933 Double Eagle. Perhaps the reason Fenton does not call his argument a collateral estoppel argument is that he is aware of the long standing doctrine that a party seeking to assert estoppel against the Government must demonstrate affirmative misconduct; mere negligence or inadvertent mistake does not give rise to an estoppel defense against the sovereign. Drozd v. INS, 155 F.3d 81, 90 (2d Cir. 1998); City of New York v. Shalala, 34 F.3d 1161, 1168 (2d Cir. 1994); United States v. Boccanfuso, 882 F.2d 666 (2d Cir. 1989). It is plain that there was no affirmative misconduct involved in the Government's issuance of an export license to King Farouk; it was, at most, an inadvertent mistake, and thus, the law is clear that there is "waiver" or "estoppel" of the Government's power to seek forfeiture or title to the piece.

issue in this case, as it cannot be disputed that the Government had no knowledge that uncirculated 1933 $20 Double Eagles had been stolen from the Mint at the time it issued the export license to King Farouk. The export license to King Farouk did not transform the coin into non-stolen property nor did it transfer title from the US to King Farouk, and summary judgment cannot be issued.

**II. THE 1954 TREASURY ORDER DOES NOT APPLY TO STOLEN PROPERTY**

Fenton asserts as another basis for summary judgment a 1954 Treasury Order that, according to Fenton, expanded the exemptions to the Roosevelt-era gold prohibitions to include "gold coin having a recognized special value to collectors of rare and unusual coin, including all gold coin made prior to April 5, 1933." Berke Decl. Ex. H. Fenton argues that this 1954 Treasury Order means that the Government has "renounced any ownership interest in the coin and bestowed it upon the private individual possessing the coin." Br. at 47. This argument is based on a plain misinterpretation of the Order and has no merit.

As a threshold matter, Fenton's argument is factually untenable, as approximately 80% of the total number of 1933 Double $20 Double Eagles struck by the Mint were struck after April 5, 1933. Of the 445,500 struck, 100,000, approximately 22% of the total, were made between March 15 and March 24; the remaining 345,500, or 78%, were struck between April 7 and May

19. Because 1933 Double Eagles are indistinguishable, Fenton could not prove the precise date that the defendant-in-rem 1933 Double Eagle was struck, and accordingly there is an 78% probability that the defendant-in-rem 1933 Double Eagle was struck after April 5, 1933. A 78% likelihood is far greater than either the probable cause or preponderance standard, and thus, the 1954 regulation is inapplicable to the defendant-in-rem 1933 Double Eagle on that basis alone.

The 1954 Treasury Order can be disposed of on more substantive grounds as well. The 1954 Treasury Order contains a preamble that expressly and explicitly states that the Order is intended to provide a form of amnesty for coins that had been <u>in circulation</u> prior to April 5, but for whatever reason had not returned to the United States. The 1954 Treasury Order recognizes that its predecessor, the December 28, 1933 Treasury Order, "required the delivery to the United States of gold coin, except gold coin having a recognized special value to collectors of rare and unusual coin and certain other exceptions not here pertinent." The 1954 Treasury Order continues:

> Whereas twenty years have elapsed since the date of this order, a substantial portion of the gold coins <u>known to have been in circulation on that date</u> have been delivered in accordance with its provisions, and part of the gold coins outstanding in 1933 are known to have been held abroad and therefore not subject to the requirement of delivery.

(emphasis added). The Order then states that it is assumed that

most of the coins required to be delivered under the December 28, 1933 Order have been delivered and that it is not in the public interest to continue examination of "gold coins minted prior to 1933." It is in this context that the 1954 Treasury Order amended the December 28, 1933 Treasury Order to require delivery to the United States of all gold coin, except "gold coin having a recognized special value to collectors of rare and unusual coin, including all gold coin made prior to April 5, 1933." It is clear from the plain text that the 1954 Treasury Order applies only to coins that were at one time in circulation. It does not and cannot be read to authorize the private possession of a gold piece that was stolen from the Mint and that was never legally placed in circulation either as currency or a collectible coin.

Fenton's reliance on the 1954 Treasury Order again exposes the fallacy pervading his analysis of this case -- that 1933 $20 Double Eagles fall into the category of gold coin "having recognized special value to collectors or rare and unusual coin." The United States is the legal owner of all 1933 $20 Double Eagles by virtue of the fact that the United States Mint struck them and never issued them as currency or otherwise conveyed them to another person or entity. The defendant-in-rem 1933 $20 Double Eagle was not "exempted" from the December 28, 1933 Order as a collectible coin, or from any other gold restriction. The defendant-in-rem 1933 Double Eagle is stolen

property and is not legal to own no matter how coveted or valuable it may be to coin dealers. To be sure, stolen property may well have great cache in the market for rare art and collectable objects, but it tortures the plain meaning and express intent of the 1954 Treasury Order beyond recognition to say that it "renounced" the Government's ownership interest in the stolen 1933 $20 Double Eagles.

**III. THE COINAGE ACT OF 1965 IS INAPPLICABLE TO THIS CASE**

Fenton also fruitlessly relies on the Coinage Act of 1965. Berke Dec. Ex. JJ. This legislation is, like the 1954 Treasury Order, facially inapplicable to this case. Indeed, the legislative history to the Coinage Act of 1965 specifies that it in no way changed then existing law. Furthermore, Fenton neglects to point out that the particular provision of the Coinage Act of 1965 that he relies on has been recodified and no longer contains the particular language on which his argument is based.

The Coinage Act of 1965 was "intended to conserve this Nation's rapidly dwindling supply of silver -- a metal essential to defense needs, to industry and the arts." Levine Dec. Ex. KK. The Act eliminated the use of silver in all denominations of coins except the silver dollar. The Act further authorized the mintage of a new type of "clad" or "sandwich" coin consisting of copper and nickel. The House and Senate reports to the bill are

devoted to a technical discussion of the depleting supply of silver, the need to curtail use of silver, and the benefits of using other materials such as copper and nickel to make coins. Levine Dec. See H.R. Rep. No. 89-509 (1965), Levine Dec. Exs. KK and LL.

The section of the Coinage Act of 1965 Fenton invokes in defense to this action is Section 102, which states in full:

> All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations), regardless of when coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues.

On its face this language has no application here. The section applies to coins and currencies that have been "coined or issued." Fenton would have the court interpret the word "coined" to mean struck or manufactured. Under Fenton's reading of this statute, any round disk-like object manufactured by the United States which could be said to look like a coin is "coined" and therefore, under the Coinage Act of 1965, is legal tender for payment of debts, taxes, duties and dues regardless of Government intent. Thus, the striking of a disk obligates the Government to stand behind and redeem the disk, even if the Government had no intention to issue it. This a ludicrous reading of the term and contradicts established meaning of the term "legal tender" and defies the legislative history to this section.

The Constitution of the United States empowers Congress, "To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures." U.S. Const. Art. I, § 8. Clearly, the word "coin" used as a verb means to make currency; certainly the Founding Fathers did not provide for Congressional power to merely manufacture circular metal objects. Thus, when the Coinage Act of 1965 speaks of "all coins and currencies .... regardless of when coined or issued" it is plainly referring to money -- it does not include objects struck by the Mint but never issued and released as money.

This interpretation is fully supported by the legislative history for Section 102. The House Report expressly states that this section was not to be interpreted to effect any change in existing law. The House Report states:

> Section 102 ... makes all coins and currencies of the United States legal tender. Section 210 of the bill therefore repeals the last sentence of section 43(b)(1) of the act of May 12, 1933 (31 U.S.C. § 462), which is to the same effect, in order to avoid raising any possible implication that section 102 of the bill is anything more than a restatement of existing law.

H.R. Rep. No. 89-509 (1965) annexed at Levine Dec. Ex. KK (emphasis added). Looking at the last sentence of section 43(b)(1) of the act of May 12, 1933 (31 U.S.C. § 462), the point becomes even more obvious. First, Section 43 of the May 12, 1933 Act is entitled "Financing - and Exercising Power Conferred By Section 8 of Article I of the Constitution: To Coin Money and To

Regulate the Value Thereof." Thus, the act expressly relates to coining money in the sense discussed above. Section 43(b)(1) was an anti-gold standard measure that directed the Secretary of the Treasury to issue paper money not backed by gold. The last line of that section -- the one replaced by Section 102 of the Coinage Act of 1965 -- merely provides that:

> Such notes and all other coins and currencies heretofore or hereafter coined or issued by or under the authority of the United States shall be legal tender for all debts public and private.

Levine Dec. Ex. KK. There can be no question that this sentence refers to coins and currencies that were coined as money and does not apply to "uncoined" and "unissued" 1933 Double Eagles.

Fenton's contention that the Coinage Act of 1965 implemented a sea change in the law concerning legal tender status is belied by the legislative history. Fenton relies exclusively on hornbook law about the meaning of words used in the disjunctive. However, no theory of statutory interpretation supports the proposition that the Government can be deemed to have created legal tender merely by shaping metal into a coin-shape; a piece of metal or gold becomes money only when the sovereign so intends.

Finally, the Coinage Act of 1965 was recodified in 1983. The particular phrase relied on so heavily by Fenton -- "regardless of when coined or issued" -- has been deleted from

the current version of the law. Title 31, United States Code, Section 5103, governing entitled "Legal Tender" now states:

> United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts.

31 U.S.C. § 5103. The phrase was deleted because it was unnecessary and added nothing to the statute. All versions of this law -- 1933, 1965 and current -- have the same meaning, and that meaning has absolutely nothing to do with any issue in this case. The Mint struck 1933 $20 Double Eagles, but never "coined" or issued them within the meaning of that phrase as used in the Constitution or any statute. Fenton's reliance on this language is thus utterly without merit.[15]

---

[15] The absurdity of Fenton's argument is nicely illustrated by the brief submitted by Professional Numismatics Guild as amicus curiae. Under Fenton's reading of the statute, the pattern coins, medals, experimental pieces discussed in that brief would be legal tender for payment of debts since they were "coined" in the sense that they were struck by the United States. Clearly, the statute uses the word "coined" in the constitutional sense, meaning something more than simply having molded a piece of gold into a round shape.

## IV. THE DEFENDANT-IN-REM 1933 DOUBLE EAGLE WAS IMPORTED BY MEANS OF MATERIAL FALSE STATEMENTS REGARDING ITS IDENTITY AND VALUE AND WHETHER FENTON KNOWINGLY CAUSED MATERIALLY FALSE STATEMENTS TO BE MADE IS A GENUINE QUESTION OF FACT THAT CANNOT BE RESOLVED ON SUMMARY JUDGMENT

### A. Applicable Legal Standards

To sustain the False Statement forfeiture claim the Government must demonstrate probable cause that the defendant-in-rem 1933 Double Eagle was imported into the United States by means of material false statements, in violation of 18 U.S.C. § 542.

Title 18, United States Code, Section 545, prohibits the importation of merchandise "contrary to law" and requires forfeiture of such illegally imported merchandise:

> Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

18 U.S.C. 545 (as amended Sept. 13, 1994). The second paragraph of section 545 provides criminal penalties against:

> [w]hoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into United States contrary to law ...

18 U.S.C. § 545 (as amended Sept. 13, 1994).

Title 18, United States Code, Section 542, prohibits

the making of false statements on various documents, including Customs forms:

> Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal ... or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement ... [shall be fined for each offense under this title or imprisoned not more than two years, or both.

18 U.S.C. § 542.

**B. The Defendant-In-Rem 1933 Double Eagle Was Imported By Means of Knowingly Material False Statements on Customs Forms**

Fenton argues that he did not knowingly make false statements on Customs forms because the forms were completed by Fenton's Custom's broker, Larry Baker of Jet Air, and that Mr. Baker completed the documents containing the false statements on his own without Fenton's participation. Br. at 51-2. Mr. Baker's deposition testimony, however, does not pose an undisputed defense to the False Statement forfeiture claim. On the contrary, when viewed in the context of other evidence in the record, it supports the Government's claim. Accordingly, there is a genuine question of fact as to Fenton's knowledge of the false statements precluding summary judgment.

Mr. Baker testified that his company, Jet Air, acted as

Fenton's Customs broker and prepared the Customs forms for an importation of coins on February 1996. To avoid paying a processing fee, Mr. Baker prepared a substitute invoice to be submitted to Customs for the coins being imported. The substitute invoice falsely described the coins as "LEGAL TENDER U.S. COINS MINTED BY THE UNITED STATES GOVERNMENT BETWEEN 1830 AND 1932." Berke Dec. Ex. GG. Customs Form 3461, prepared by Mr. Baker contained a false valuation of the coins being imported as approximately $742,000. Levine Dec. Ex. PP. Mr. Baker stated that the description of the coins as legal tender dated between 1830 and 1932 was boilerplate that Mr. Baker, not Fenton, had created with assistance from persons knowledgeable about the dates of United States coins. Levine Ex. NN, Baker Dep. at 38-34. Both Baker and Fenton testified that the monetary value of the United States coins being imported was provided by Fenton. Ex. NN Baker Dep. at 23-28; Levine Dec. Ex. OO, Fenton Dep. at 158-170. Fenton testified at his deposition that he arrived at that figure by valuing the defendant-in-rem 1933 Double Eagle at $350,000. Levine Dec. Ex. OO, Fenton Dep. at 170, 190-191. Mr. Baker also testified that Fenton had been a client of Jet Air's for several years in connection with the importation of coins. Ex. NN Baker Dep. at 19.

While Fenton did not complete the Customs form himself, a genuine question of fact exists as to whether Fenton

nonetheless knew that Jet Air would use its standard boilerplate description incorrectly describing the coins as legal tender dated up to 1932, and thereby procured the making of a material false statement to facilitate importation of the 1933 Double Eagle, which Fenton knew to be subject to seizure by the United States.

Fenton imported the defendant-in-rem 1933 Double Eagle for the purpose of consummating a sale for $1.5 million at the Waldorf Astoria Hotel on February 2 1996. Fenton had arranged this sale through his agent in the United States, Jasper Parrino, who negotiated the sale on Fenton's behalf with Jack Moore, an individual acting as a Secret Service informant who posed as the representative for a coin collector. The taped conversations between Parrino and Moore reflect, among other things, recognition that the 1933 Double Eagle's legal status in the United States was doubtful and Parrino's efforts on Fenton's behalf to have the actual transfer of the piece from Fenton to the buyer take place at a location <u>outside</u> of the United States. During their discussions regarding the transaction, Parrino informed Moore, among other things, that the 1933 Double Eagle and the seller were overseas, and that the seller was reluctant to bring the coin into the United States because "it is okay over there, but it's not okay over here." See Levine Dec. Ex. QQ Fenton ultimately agreed to come to the United States after Moore

offered to have the buyer pay substantially more money.

On February 8, 1996, a meeting took place at the Waldorf Astoria Hotel in Manhattan, where Parrino and Fenton provided the 1933 Double Eagle $20 gold coin to Moore and a Secret Service Agent posing as a coin expert. Levine Dec. Ex. QQ During this meeting, which was consensually recorded on video and audio tape, Parrino asked, among other things, how the value of the coin would be affected in the event the transaction were "legalized." Fenton's reply reflected his knowledge that the 1933 Double Eagle was stolen property wanted by the United States, as he stated, in substance and in part, that it would double the value.[16] These facts establish Fenton's motive and incentive for falsifying importation documents to bring the defendant-in-rem 1933 Double Eagle into the United States.

Fenton's knowledge of and role in the procurement of the falsely dated invoice Customs form is further established by a January 3, 1996 meeting between Jasper Parrino (Fenton's representative) and Jack Moore (the confidential informant), in which Moore asked Parrino how the coin would be brought into the

---

[16] As a result of these events, the Government filed a criminal complaint (96 Mag. 229), charging Fenton and Parrino with conspiring to embezzle, and convert to their use property belonging to the United States in violation of 18 U.S.C. § 371. On April 10, 1996, the Government moved to dismiss those charges without prejudice. There are no pending criminal charges against either Fenton or Parrino relating to the 1933 Double Eagle at this time.

United States. Parrino told Moore that that it would be brought in either in a roll of bullion or in a set "mislabeled" as a 1932. The statement was consensually tape recorded and is also reflected in a contemporaneous Secret Service report. Levine Dec. Ex. RR. Given that a misdated invoice is precisely how the 1933 Double Eagle passed through United States Customs, it can be readily inferred that Fenton knew Mr. Baker would be using his standard boilerplate which did not include the date 1933. There is no dispute that Fenton never told Mr. Baker specifically that he was importing a 1933 Double Eagle. Fenton testified that he had previously used Jet Air as his Customs Broker for importation of U.S. coins, and Mr. Baker testified that the form he used was one he had used many times in the past for coin importations. Fenton Aff. ¶ 3.

Moreover, the Government is entitled to the "adverse inference" that can be drawn from Fenton's selective invocation and waiver of the 5th Amendment privilege against self incrimination. Baxter v. Palmigiano, 425 U.S. 308 (1976); United States v. Certain Real Property and Premises Known as 4003-4005 5th Ave., 55 F.3d 78,82-83 (2d Cir. 1995) (where party invokes 5th amendment in forfeiture proceeding, other side has no recourse but to "comment upon the claim of privilege in the hope of persuading the trier of fact to draw a negative inference"); United States v. Ianniello, 824 F.2d 203, 208 (2d Cir. 1987).

While Fenton waived the 5th amendment privilege at his deposition with respect to certain carefully chosen topics, including his role in the preparation of the Customs forms for importation of the coin, he invoked his 5th amendment privilege against self-incrimination as the basis for refusing to answer any questions about, among other things, his knowledge that the 1933 Double Eagle was stolen property belonging to the United States and his discussions and dealings with Jasper Parrino in an effort to sell the coin in the United States. Fenton Dep. at 79-108.[17] In particular, Fenton invoked the 5th Amendment privilege in response to questions concerning whether he ever told Parrino that the 1933 Double Eagle would be imported by means of a misdated invoice. Fenton Dep. at 115-6.

Moreover, the Government is entitled to ask the trier of fact to draw an adverse inference from the fact that Jasper Parrino refused to provide answers to any questions at all and simply invoked the 5th Amendment privilege wholesale. Levine Dec. Ex. UU. The Second Circuit has held that a non-party's invocation of the Fifth Amendment privilege may be admissible for the purpose of drawing an adverse inference against a party.

---

[17] Fenton and Parrino made voluntary post-arrest statements to Secret Service Agents. Levine Dec. Exs. SS and TT. The account Fenton gave to Secret Service agents of how he acquired the 1933 Double Eagle is patently incredible, and further seriously contradicts his deposition testimony. Mr. Fenton admitted in his post-arrest interview that he was "not sure of ownership restrictions in the United States."

LiButti v. United States, 107 F.3d 110, 120-124 (2d Cir. 1997).

Accordingly, the fact that both Fenton and Parrino invoked the privilege against self-incrimination is admissible evidence and the trier of fact is permitted to infer from the refusals to testify that the testimony would be adverse, specifically, that Fenton and/or Parrino were aware that the defendant-in-rem 1933 Double Eagle was regarded by the United States as stolen property not authorized for private ownership and that the Customs form was knowingly misdated to camouflage that they were importing a 1933 $20 Double Eagle.

Thus, looking at the totality of facts, including that Fenton and Parrino were attempting to import a piece known to them to be of illicit legal status, combined with Parrino's explicit statement to Moore that the coin would be brought in by means of a misdated invoice, combined with Fenton's previous experience using Jet Air and his likely knowledge that Baker would use the same misdated boilerplate form he had used in the past, and combined with Fenton's and Parrino's invocation of the privilege against self-incrimination on the subject of their knowledge, there is strong probative evidence that the false statement on the customs form was knowing.

Moreover, there is no dispute that Fenton provided Mr. Baker with a falsely deflated monetary value. Levine Dec. Ex. OO, Fenton Dep. at 287-89. The consenually taped conversations

between Parrino and Moore establish that there was an agreement that Fenton would sell the 1933 Double Eagle for $1.5 million dollars. Thus, Fenton's valuation of the coin as $350,000 for purposes of the Customs importation forms was knowingly false. It can be readily inferred that Fenton intentionally misvalued the coins to further hide its identity.

**C. The False Statements Were Material, And In Any Event Materiality Is a Question of Fact**

Fenton argues that the false dates and valuations provided on the Customs document were not "material" for purposes of 18 U.S.C. § 542. Br. 54. Fenton contends that because there is no Customs regulation requiring the dates of coins to be provided, a false date cannot as a matter of law be deemed a material false statement.

The Second Circuit recently ruled on the test of "materiality" for purposes of Section 542 in United States v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999), cert. denied, 68 U.S.L.W. 3274 (Jan. 24, 2000). The Court rejected the "but for" test, that a false statement is material only if a truthful answer would have actually prevented the item from entering the United States. United States v. An Antique Platter of Gold, 184 F.3d at 135. The standard adopted in this Circuit is that a false statement is material if it "'has the potential significantly to affect the integrity or operation of the

importation process as a whole, and that neither actual causation nor harm to the government need be demonstrated.'" An Antique Platter, 184 F.3d at 136, citing Holmquist, 36 F.3d at 159. The Court stated that to determine whether a false statement is material the trier of fact needs to ask whether a "reasonable customs official would consider the statements to be significant to the exercise of his or her official duties." An Antique Platter, 184 F.3d at 136. The Court analogized the test to that applicable to "materiality" in the securities context, where a statement is material if there is a substantial likelihood that a reasonable investor would view it as significantly altering the total mix of information made available." Id.

Under this test, the true date of the gold piece is material, as it is information that identifies the piece as stolen, which is information a reasonable customs official would want to know in assessing whether the goods are being properly imported. The date 1933 has enormous significance in the identification of gold coins given that no 1933 gold coins were issued as legal tender and every 1933 $20 Double Eagle is stolen property.

Fenton incorrectly argues that the date was not material because the Customs forms did not require dates to be given. However, there is no requirement under the materiality test that the false information be supplied in response to a

specific requirement. A false statement is actionable even where the filing in which it was made was not required by agency regulations. United States v. Masters, 612 F.2d 1117, 1120 (9th Cir. 1979), cert. denied, 449 U.S. 847 (1980). Any false information that interferes with the customs process is material. In the instant case, the invoice falsified the most significant information being given -- the very identity of the gold piece being imported. The date "1933" earmarks a U.S. gold piece as stolen property, and therefore it is plainly material information.

In addition, the defendant-in-rem 1933 Double Eagle is subject to seizure for violation of 19 U.S.C. § 1592(a) (prohibiting entry of merchandise by means of any document that contains a material omission, whether by fraud, gross negligence, or negligence) based on the false statement declaring the aggregate value of the United States gold coins to be $742,000, when the 1933 Double Eagle alone was about to be sold for $1.5 million.

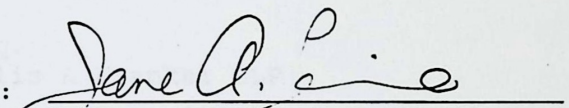
Thus, the false statements concerning the 1933 Double Eagle would have had a tendency to influence the Customs Service's decision-making process and to significantly affect the integrity of the importation process as a whole, and were therefore material. To the extent materiality is in dispute, it is also a question that cannot be resolved on summary judgment.

## CONCLUSION

For all the foregoing reasons, Fenton's motion for summary judgment should be denied in all respects.

Dated: New York, New York
March 3, 2000

MARY JO WHITE
United States Attorney for the
Southern District of New York
Attorney for Plaintiff
United States of America

By: 

JANE A. LEVINE (JAL-3332)
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 637-1063

CERTIFICATE OF SERVICE

I, Andrea Harris, am employed at the office of the United States Attorney's Office for the Southern District of New York as a contract employee under the Asset Forfeiture contract.

On the 3rd day of March, 2000, I served a copy of the within "Government's Motion in Opposition to Claimant's Motion for Summary Judgment" by personally delivering same to:

Barry H. Berke, Esq.
Kramer Levin Naftalis & Frankel LLP
919 Third Avenue
New York, New York 10022

I certify under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 2000

Andrea Harris
ANDREA HARRIS